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Supreme Court, U. S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HOLLYWOOD MARINE, INC. and
WATER QUALITY INSURANCE SYNDICATE,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court below erred in *United States v. LeBeouf Bros. Towing Co.* and this case in deciding that a dumb barge owner is not entitled to the "third party defense" provided for in 33 U.S.C. § 1321(f)(1)?

2. Whether the Court below erred in deciding that its decision in *United States v. LeBeouf Bros. Towing Co.* was dispositive of the instant litigation? In other words, assuming arguendo that *LeBeouf* was decided correctly under its own facts, is the instant case distinguishable and should Petitioners herein nevertheless be granted the benefit of the "third party defense" provided for in 33 U.S.C. § 1321(f)(1)?

LIST OF ALL PARTIES BELOW

1. United States of America—Plaintiff/Appellant/Respondent

2. Hollywood Marine, Inc.—Defendant/Appellee/Petitioner

3. Water Quality Insurance Syndicate—Defendant/Appellee/Petitioner

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REFERENCE TO OPINIONS BELOW

The judgment and findings of fact and conclusions of law entered by the United States District Court for the Southern District of Texas—Houston Division in favor of Petitioners are printed in Appendix B hereto and are unreported.

The order of the United States Court of Appeals for the Fifth Circuit granting Respondent's Motion for Summary Reversal and Remand is printed in Appendix A and C hereto and is reported at 625 F.2d 524 (5th Cir. 1980).

The order of the United States Court of Appeals for the Fifth Circuit denying Petitioner's Petition for Rehearing is printed in Appendix C hereto and is unreported.

JURISDICTIONAL GROUNDS IN THIS COURT

The order of the United States Court of Appeals for the Fifth Circuit granting Respondent's Motion for Summary Reversal and Remand, printed in Appendix A and C hereto, was entered on August 25, 1980.

The order of the United States Court of Appeals for the Fifth Circuit denying Petitioner's Petition for Rehearing, printed in Appendix C hereto, was entered on October 15, 1980.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The statutory act around which the instant case revolves is the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, as amended, 33 U.S.C. §§ 1251-1376. The relevant provisions of this Act, § 1321 (f)(1) and § 1321(g) are set forth below:

§ 1321(f)(1)—Liability for actual costs of removal.

> "(f)(1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing

clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed, . . ."

§ 1321(g)—Third party liability.

"(g) Where the owner or operator of a vessel (other than an inland oil barge) carrying oil or hazardous substances as cargo or an onshore or offshore facility which handles or stores oil or hazardous substances in bulk, from which oil or a hazardous substance is discharged in violation of subsection (b) of this section, alleges that such discharge was caused solely by an act or omission of a third party, such owner or operator shall pay to the United States Government the actual costs incurred under subsection (C) of this section for removal of such oil or substance and shall be entitled by subrogation to all rights of the United States Government to recover such costs from such third party under this subsection. In any case where an owner or operator of a vessel, of an onshore facility, or of an offshore facility, from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section, proves that such discharge of oil or hazardous substance was caused solely by an act of omission of a third party, or was caused solely by such an act or omission in combination with an act of God, an act of war, or negligence on the part of the United States Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for removal of such oil or sub-

stance, except where such third party can prove that such discharge was caused solely by (A) an act of God, (b) an act of war, (C) negligence on the part of the United States Government, or (d) an act or omission of another party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel which caused the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section, the liability of such third party under this subsection shall not exceed, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater. In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore or offshore facility from which the discharge actually occurred if such owner or operator were liable. . . ."

STATEMENT OF THE CASE

Hollywood Marine, Inc. (hereinafter "Petitioner") is engaged in the business of providing unmanned barges for movement of petroleum cargo upon the inland and coastal waters of Texas, including the Gulf Intracoastal Waterway. These barges are transported through the use of tugs exclusively owned, controlled and operated by third parties. Co-Petitioner Water Quality Insurance Syndicate is the pollution insurer for Hollywood Marine, Inc.

On January 13, 1976, Petitioner entered into a contract with Three Jack Towing, Inc. whereby the latter was to provide the motive power (Tug Three Jack) and

perform towage services with Petitioner's barges. The agreement expressly provided, among other things, that Three Jack Towing, Inc. would act solely as an independent contractor and would have exclusive control in every particular of the manner and method of performing towage operations. All navigational functions were in fact performed by Three Jack Towing, Inc. during the existence of the agreement, with Petitioner doing no more than specifying the tug/tow itinerary.

On or about August 5, 1976, while the above mentioned agreement was in full force and effect, Petitioner's Barge B-524 in tow of the Tug Three Jack and in a seaworthy condition was proceeding eastbound in the Gulf Intracoastal Waterway at approximately mile 255 when oil was observed spilling from the barge into navigable waters of the United States. At no time during this towage operation did Petitioner control or have a right to control the manner or method of navigation of the tug and tow, nor did it direct or supervise the master or crew of the tug in performing navigational functions. Such direction, supervision and control was a physical impossibility in light of the undisputed fact that Petitioner had no personnel onboard the tug or barge at any time while they were in navigation.

This spill was cleaned up by Respondent at a cost of $61,736.07 and a suit was brought by it against Petitioners seeking recovery of cleanup costs pursuant to 33 U.S.C. § 1321(f) and 33 U.S.C. § 1321(g)(3).

At the trial court level, Petitioners asserted that the spill was caused solely by the act or omission of a third party, in this instance, the mate onboard the Tug Three Jack who was in exclusive control of the tug and tow at

the time of the spill. The case proceeded to trial on April 9, 1980. Thereafter, on April 15, 1980, the District Court entered judgment for Petitioners holding that Hollywood Marine Inc., having turned over its unmanned, non-self-propelled barge to the Tug Three Jack, could not be held responsible for cleanup costs incurred as a result of acts or omissions of the "third party" tug over whom it had not control. Petitioners were thereby granted the "third party defense" in 33 U.S.C. § 1321(f)(1).

Respondent subsequently appealed and, based on the recent decision by the Fifth Circuit in *United States v. LeBeouf Bros. Towing Co.*, 621 F.2d 787 (5th Cir. 1980), reh. den. 629 F.2d 1350 (5th Cir. 1980), filed a motion for summary reversal and remand. In consequence, the Fifth Circuit entered an order on August 25, 1980 in this case holding *LeBeouf* to be dispositive and the "third party defense" in 33 U.S.C. § 1321(f)(1) to be inapplicable to an owner of a dumb barge in a tug/tow context. A Petition for Rehearing was timely filed by Petitioners and later denied by order of the Fifth Circuit entered October 15, 1980.

REASONS FOR GRANTING THE WRIT

This Petition raises substantial and important questions concerning interpretation of § 1321(f)(1) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251, et seq. (hereinafter referred to as the "F.W.P.C.A."). In rendering its recent decision in *United States v. LeBeouf Bros. Towing Co.*, 621 F.2d 787 (5th Cir. 1980), reh. den., 629 F.2d 1350 (5th Cir. 1980) and *United States v. Hollywood Marine, Inc.*, 625 F.2d 524 (5th Cir. 1980), reh. den., ____ (5th Cir. 1980),

the Fifth Circuit has failed to apply traditional maritime principles in aid of interpretation of the F.W.P.C.A. in conflict with the First Circuit decision in *Burgess v. Tamano,* 564 F.2d 964 (1st Cir. 1977), cert. den., 435 U.S. 941, 98 S.Ct. 1520, 55 L.Ed.2d 537 (1978) and the Second Circuit decision in *Tug Ocean Prince, Inc. v. United States,* 436 F.Supp 907 (S.D. N.Y. 1977), aff'd in part and rev'd in part on other grounds, 584 F.2d 1151 (2nd Cir. 1978), cert. den. 440 U.S. 959, 99 S.Ct. 1499, 59 L.Ed.2d 772 (1979). Still further, these new Fifth Circuit decisions have run afoul of more than one hundred years of admiralty jurisprudence respecting the law of tug and tow.

I.

Throughout the course of this proceeding the paramount contention by Petitioners has been that a dumb barge owner who has turned its vessel to an independently contracting third party tug for towage, without retaining a scintilla of navigational and operational control, is unequivocally entitled to the benefit of the "third party defense" provided for in 33 U.S.C. § 1321(f)(1) when a discharge of oil occurs from the barge in navigation. Under this statutory section, the discharger is relieved of liability to the Government for cleanup costs where he can prove that the discharge was caused solely by the act or omission of a third party regardless of whether such act or omission was negligent.

While this Court has not heretofore directly ruled upon proper construction of the F.W.P.C.A., both the First and Second Circuits have. In each instance, these Circuits have relied upon traditional maritime jurisprudence in an

effort to harmonize the apparent legislative history and intent of the F.W.P.C.A. with the facts confronting them and accordingly have rendered opinions wholly consistent with the pre-existing body of maritime case law.

In *Tamano* (supra at p. 7), the First Circuit was faced with a spill resulting from navigational error on the part of a compulsory pilot in command of the spilling vessel, a supertanker. Without benefit of statutory definition of the term "third party" as used in § 1321(f)(1) or elsewhere in the F.W.P.C.A., the Court resorted to time-honored admiralty principles in holding that the acts of a pilot are to be imputed to the vessel *because he was at all time subject to the ultimate control of the vessel's master. CHINA,* 7 Wall. (74 U.S.) 53, 19 L.Ed. 67 (1869). Therefore, only *after* interjection of existing maritime law was the First Circuit able to render its decision disallowing the "third party defense" under the circumstances.

The Second Circuit has affirmed a similar approach to F.W.P.C.A. interpretation in a tug/tow context. In *Tug Ocean Prince* (supra at p. 7), a discharge of petroleum product resulted from grounding of a barge in navigation. The grounding was found to have been caused by a grave navigational error by the master at the helm of the tug. The District Court, confronted with a multitude of issues including interpretation of the term "third party" as used in both § 1321(f)(1) and § 1321(g), engaged in an extended discussion of maritime principles in an effort to reconcile the legislative history and intent of the F.W.P.C.A. with the facts and what it regarded as the clear import of the Act. After first determining that the tug was a "third party" as to the discharging barge in its tow, the trial court went on to consideration of the tug's right to limit liability under § 1321(g), stating:

> "Clearly [§ 1321(g)] represents a *conscious legislative choice to inject traditional admiralty concepts* into the limitation calculation by limiting a third party vessel owner's liability with reference to 'his' vessel rather than the vessel which actually spilled the oil. . . .
>
> The legislative history indicates that the drafters, in providing the third party defense, envisioned a situation where the third party vessel collides with an oil carrying vessel. S. Rep. No. 91-351 at 5, 91st Cong., 1st Sess. (1969), 3 E.P.A. Legal Compilation (Water) at 1329. The available legislative materials provide no clue as to whether the drafters ever considered the situation presented where a substantially small vessel either collides with or, as presented here, negligently caused the oil spillage. *It is inconceivable that Congress was unaware that much of the oil moving on inland waterways is carried by barges and that the tugs pushing them are often owned by third parties.*" 436 F.Supp. at 923 (emphasis added)

Upon completion of its analysis, the trial court concluded that the Government's cause of action against the barge owner for cleanup costs should be dismissed, the barge not having been in control of the navigation of the tug and tow and therefore having no responsibility for the spill. It went further to find the tug owner liable for the cleanup costs, but entitled to limit its liability under § 1321(g) to the gross tonnage of its tug. *Id.* at 926-927.

Although reversing in part on other grounds, the Second Circuit in *Tug Ocean Prince* (supra at p. 7) found the trial court's interpretation of the phrase "third party" to be flawless and affirmed the trial court judgment finding the "third party" tug owner to be liable for the spill and its cleanup to the exclusion of the dumb barge owner, therefore dismissing the Government's claim against the barge owner

for cleanup costs. It took umbrage only with the trial court's assessment of facts felt to give rise to the tug owner's right to limit liability and upon reassessment, denied the tug owner this right because of wilful misconduct—an issue not relevant to the instant litigation. *See* 584 F.2d at 1164. The inescapable conclusion to be drawn from this affirmance is that a tug in a tug/tow situation is to be considered a "third party" for purposes of § 1321(f)(1). Again however, only after accepting the trial court's superimposition of maritime concepts on the F.W.P.C.A. for interpretive purposes was the Second Circuit able to reach the appropriate result.

It is interesting to note that this Court denied certiorari in both *Tamano* (supra at p. 7) and *Tug Ocean Prince* (supra at p. 7). Viewing these cases in terms of their ultimate holding, they appear to be in direct conflict with one another. It is submitted however, that these courts followed the "maritime jurisprudence approach" in rendering their decisions and that the Supreme Court did likewise in denying certiorari in the more recent *Tug Ocean Prince* decision, thereby reconciling in its entirety what merely appeared at that time to be a conflict between the circuits.

In *LeBeouf* (supra at p. 6) and *Hollywood* (supra at p. 6), the Fifth Circuit has without explanation totally ignored the First and Second Circuit approach to F.W.P.C.A. interpretation—an approach sanctioned by this Court by virtue of its denial of certiorari. While purporting to have followed the reasoning of the First Circuit in *Tamano,* it is evident that in deciding *LeBeouf* the Fifth Circuit did little more than adopt *Tamano's* bottom line. *LeBeouf* and *Hollywood,* if permitted to stand, will completely obliterate over one

hundred years of meritorious precedent in the law of tug and tow. By depriving a discharging barge owner of the benefit of the "third party defense" under 33 U.S.C. § 1321(f)(1), the Fifth Circuit has silently, but unequivocally, overruled long-standing admiralty precedent emanating from this Court and its own Circuit holding that a dumb barge is *not* liable for the tug's fault merely because the two vessels are attached. *Sturgis v. Boyer,* 65 U.S. 110, 122-25 (1860); *Eugene F. Moran v. New York C. & H.R.R. Co.,* 212 U.S. 466 (1909); *Liverpool, B. & R.P. Steam Nav. Co. v. Brooklyn Eastern Dist. Term.,* 251 U.S. 48, 40 S.Ct. 66 (1919); *The Inca,* 148 F. 363 (5th Cir. 1906); *C. W. Mills,* 241 F. 204 (S.D. Ala. 1915), aff'd, 241 F. 378 (5th Cir. 1917). This Court has long subscribed to the principle of assigning separate and distinct identities to tug and tow for purposes of liability analysis. *Sturgis v. Boyer* (supra). The tug owner, *not* the barge owner, is responsible for safe navigation of the tow. *Hart v. Blakemore,* 410 F.2d 218, 221 (5th Cir. 1969). As between tug and tow, it is settled that the tug is the "dominant mind" in sole control of the movement of its tow and therefore exclusively responsible for damage to third parties occasioned by its fault in the absence of an independent breach of duty by the barge owner. *See Sturgis v. Boyer* (supra); *Stall & McDermott v. The Southern Cross,* 196 F.2d 309 (5th Cir. 1952); *Hart v. Blakemore* (supra). Despite the clear dictates of time honored stare decisis, the Fifth Circuit has, by altering the language of § 1321(f)(1) of the F.W.P.C.A., uttered a quasi-legislative pronouncement imputing a tug's fault to its tow despite the absence of errant conduct on the part of the tow and absent any such language in the Act. If this were the legislative intent, Congress would have said so.

Still further, the Fifth Circuit attempts to bolster its misguided construction by proclaiming the ephemeral benefits which it speculates narrow construction of the "third party defense" will confer upon the F.W.P.C.A. and traditional tort policy, i.e., more careful tug selection and insurance against potential losses. Depriving barge owners of the "third party defense" in tug/tow situations in an effort to promote more careful selection of third party tugs will not withstand careful scrutiny.

Before the enactment of the F.W.P.C.A., careful selection of the tug was of prime importance to barge owners, all of whom are concerned about the care of their barges while under tow and the cargo carried thereon. Owners of dumb barges who furnish them in seaworthy condition to an independent tug for movement, however, have never been held responsible for the tug's negligent navigation. The allowance of the statutory "third party defense" does not change their existing concern for proper tug selection. This line of reasoning is as convoluted as the old concept that liability insurance was against public policy because it encouraged carelessness by mitigating or removing the direct economic sanctions for careless conduct.

Regardless of the degree of care exercised during initial selection of a tug, the barge owner relinquishes all meaningful navigational and operational control over its vessel the moment tug and tow commence a voyage. The combination of boundless perils on the inland waters and factual conglomerations which could ultimately result in a navigational discharge of oil are impossible to eliminate or substantially mitigate by such a selection process which was already of paramount concern before the Act. Likewise, deprivation of the "third party defense" will serve as no *new* incentive for barge owners to insure against poten-

tial losses. From the inception, pollution insurance has been legislatively declared as an accepted method of demonstrating *required* financial responsibility of a vessel owner engaged in carriage of oil or hazardous substances. See 33 U.S.C. § 1321(p)(1). Moreover, pollution insurance is already predominant in the industry as is best illustrated in the instant case by virtue of the fact that Petitioner Hollywood's pollution insurer, Petitioner Water Quality Insurance Syndicate has been a party defendant in the litigation since its original filing. To place further judicial restrictions on the movement of petroleum products by virtue of unduly narrow interpretation of the "third party defense" will serve only to asphixiate an industry already gasping from voluminous regulations and an economic climate of spiraling inflation not conducive to the free flow of commerce.

LeBeouf (supra at p. 6) and *Hollywood* (supra at p. 6), if left untouched by this Honorable Court, herald the coming erosion, if not elimination, of the "dominant mind" and "separate/distinct identity" concepts in the law of tug and tow judicially created by this Court, thereby rendering every owner of a dumb barge, however innocent, vulnerable to third party liability in all maritime litigation.

Wholly apart from *LeBeouf's* drastic adverse effect on the law of tug and tow, this decision will wrongfully permit the tug owner to exculpate itself from the consequences of its own negligence. Because the *LeBeouf* decision renders the barge owner as well as the tug owner liable for cleanup costs in tug/tow situations, the Government will never hesitate to exercise a preference to sue the barge owner who in virtually all instances will be the one saddled with the vessel having a signifi-

cantly higher tonnage exposure, thereby depriving the Government of any meaningful incentive to pursue recourse against the tug. Once the barge owner is forced to pay cleanup expenses to the Government because of the fault of the third party tug, any suit it might bring against the tug owner would be further circumscribed by the 1851 Limitation of Liability Act, 46 U.S.C. §§ 181-189, 9 Stat. 635 (1851), favoring tug interests. It should be noted that by virtue of § 1321(g), the owner of an inland oil barge is expressly *not subrogated* to the rights of the Government in recovering actual costs of cleanup from the culpable third party. In this light, the barge owner would be forced to absorb any difference between the amount paid to the Government on the one hand, and the value of the tug and pending freight, if any, on the other hand. Not only is such a result in direct conflict with the holdings in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 75 S.Ct. 629 (1955) and *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U.S. 697, 83 S.Ct. 967, 10 L.Ed.2d 78 (1963) and their progeny; it also flies in the face of the obvious legislative intent of the F.W.P.C.A. This Court's attention is directed to 33 U.S.C. § 1321(g) dealing with third party liability and limitation, wherein this section states in pertinent part:

> " . . . If such *third party* was the *owner or operator of a vessel which caused the discharge* of oil or a hazardous substance in violation of subsection (b)(3) of this section, the liability of such third party under this subsection shall not exceed, . . . (emphasis ours)

Query why Congress would go to the extent of drawing a distinction in § 1321(g) by speaking in terms of own-

ers or operators of vessels which *caused the discharge* while in § 1321(f)(1), it speaks in terms of owners or operators of vessels *from which the discharge of oil or hazardous substances occurred* if it did not intend to give a barge owner the benefit of the "third party defense". Clearly such a marked distinction was not necessary merely to cover a single collision situation felt by the *LeBeouf* court to have been in the drafter's mind upon creating the third party defense. Instead, the Act speaks in broad terms relating to "causation" and "emission" in order to encompass a broader range of interests. Nowhere is the word "collision" even mentioned in a limiting or a general sense. Lack of intervention and clarification by the Supreme Court will perpetuate a direct conflict between the Circuits with regard to the proper approach to F.W.P.C.A. interpretation.

II.

Assuming arguendo that *LeBeouf* (supra at p. 6) was correctly decided under its own facts, the present case should nevertheless be decided in favor of Petitioners. First, the case at bar is demonstrably distinct from *LeBeouf* in a factual context. Second, *Hollywood* (supra at p. 6) does fall in line with the true legislative intent of the F.W.C.P.A. and is indistinguishable from *Tug Ocean Prince* (supra at p. 7) in terms of "third party defense" analysis. The issue of F.W.P.C.A. legislative intent is one that has not been previously addressed by this Court. However, as presently defined by the Fifth Circuit, the intent issue is in direct conflict with applicable decisions of this Court in related areas of maritime jurisprudence and the literal language of the Act.

The Fifth Circuit, in summarily reversing and remanding *Hollywood* on the basis of its recent decision in *LeBeouf,* took the unsupported view that the two cases were "factually similar". 625 F.2d at 524.

Unlike *Hollywood,* the *LeBeouf* case did not involve damage to a barge in navigation resulting in an oil spill. Wholly apart from the concept of negligence, it did not involve any sort of navigational act or omission. Rather, it dealt with an unlicensed tankerman's error resulting in discharge at a shore-based dock facility. 625 F.2d at 524. This factual distinction becomes critical upon further examination of the key cases dealing with interpretation of § 1321(f)(1).

Both the trial court in *Tug Ocean Prince* (supra at p. 7) and the Fifth Circuit in *LeBeouf* (supra at p. 6) note that the available legislative materials indicate that in considering creation of the "third party defense," the drafters of the F.W.P.C.A. had envisioned a situation where a third party vessel collided with an oil-carrying vessel. Clearly, as further pointed out by the lower court in *Tug Ocean Prince,* this was not their *sole* purpose as Congress must also have been aware that much of the oil moving on inland waterways is carried by barges pushed by tugs owned by third parties. Indeed, the legislative history is bereft of indication of being clothed with such an exclusivity of purpose. In either event, legislative emphasis has been placed on *navigational* acts or omissions resulting in discharge, an emphasis which encompasses the one area where the vast majority of spills will occur, i.e., in navigation, and an emphasis which pertains to both *Hollywood* (supra at p. 6) and *Tug Ocean Prince,* but is totally alien to *LeBeouf.* Petitioners have not forgotten *Tamano* (supra

at p. 7) which is easily reconcilable. Although involving a discharge caused by navigational act or omission, it must be recalled that the *Tamano* case involved a single oil-carrying vessel with self-contained motive power, not a tug/tow situation with separate and distinct vessel ownership interests. The spilling vessel in *Tamano* was the vessel in control of navigation, not a dumb, unmanned barge navigationally controlled by a separate vessel under the ultimate control of her owner.

The instant case is so closely aligned with *Tug Ocean Prince* that it is indistinguishable in any meaningful respect. Both cases are cast within the framework of a tug/tow relationship with separate vessel ownership interests and both involve a discharge of oil in navigation. The only apparent factual distinction between the two cases centers around the issue of negligence. In *Tug Ocean Prince* (supra at p. 7), the trial court found that the spill was caused by negligence or misconduct of the mate at the tug's helm. The Second Circuit on review further enhanced this finding by holding the negligence or misconduct to have been wilfull and therefore denying the tug owner's right to limit liability under § 1321(g), while nonetheless affirming the trial court's finding of the tug as a "third party" causing the spill and therefore responsible for the Government cleanup costs. In *Hollywood* (supra at p. 6), no direct finding of negligence of the tug was made. This factual variance is without relevance however as § 1321(f)(1) qualifies the "third party defense" by eliminating the issue of negligence from the determination of sole causation.

Analysis of this negligence feature of the "third party defense" enhances the cogency of Petitioners' contentions. Long before enactment of the F.W.P.C.A., it was well

settled in admiralty that a tug is liable to its tow only for negligence. The Fifth Circuit opinion in *Hart v. Blakemore,* 410 F.2d 218 (5th Cir. 1969) concisely summarizes this liability as follows:

> "Ordinarily the tug is not an insurer of the tow, nor is the tug liable as a common carrier or subject as a bailee to any presumption of fault in case of damage or loss to the tow. The tug has an obligation to exercise the reasonable care and maritime skill that prudent navigators employ in performing similar services and the burden of proving negligence is on the party that asserts it. *Stevens v. White City,* 285 U.S. 195, 52 S.Ct. 347, 76 L.Ed. 699 (1932); *River Terminals Corp. v. Southwestern Sugar & Molasses Co.,* 5 Cir. 1960, 274 F.2d 36; *Stall & McDermott v. The Southern Cross,* 5 Cir. 1952, 196 F.2d 309." *Id.* at 221.

Consideration of the above passage in conjunction with § 1321(f)(1) distinctly indicates that the drafters of the F.W.P.C.A. *did* intend to give a discharging barge owner the benefit of the "third party defense" in a tug/tow arrangement. While one of the drafters' purposes may have been to cover collision situations between a third party vessel and an oil carrying vessel, it is equally clear that in qualifying § 1321(f)(1) by alleviating proof of negligence, the drafters' intent was to expand or extend the scope of the defense to cover a dumb barge owner vis-a-vis a tug owner who, upon taking complete charge and control of a barge, assumes the nondelegable duty of its safe navigation. The Act's legislative history is bereft of any suggestion that the drafters' *sole* purpose in creating the "third party defense" was to encompass only a collision situation as described by the Fifth Circuit in *LeBeouf* (supra at p. 6). In fact, its distinctive language

gives express evidence of a contrary intent as heretofore discussed.

Further examples serve to illustrate the clear legislative intent of the F.W.P.C.A. and the faulty analysis of the Fifth Circuit in holding *LeBeouf* rather than *Tug Ocean Prince* (supra at p. 7) to be dispositive herein. If a tug and tow were of separate and distinct ownership and another vessel without tow struck the oil-carrying tow and was the sole cause of the spill without regard to negligence, the wording of the Act as well as the published legislative intent make it clear that the vessel without tow would be responsible for the cleanup costs to the exclusion of all others. Likewise, if a barge distinct in ownership from and in tow of tug A collides with a barge distinct in ownership from and in tow of tug B, causing the tug B barge to discharge oil into navigable waters and assuming that the acts or omissions of tug A were the sole cause of the spill, without regard to negligence, it appears beyond dispute that tug A would be liable to the Government for cleanup costs to the exclusion of all others including the non-spilling, colliding barge in its tow. Under established maritime collision principles, no one would even suggest that the fault of tug A should be imputed to its barge for cleanup liability purposes.

Taking the progression one step further, if the acts or omissions of the colliding but non-spilling tug with tow above were found to be a partial but not sole cause of the spill, with the acts or omissions of the other tug with spilling tow representing the remaining causative element, then under *LeBeouf* (supra at p. 6) as it presently stands, the *spilling* barge would be responsible to the Government for cleanup to the exclusion of all others. It could not invoke the

"third party defense" because the fault of its tug under the *LeBeouf* rationale is imputed to it and, further, because the fault wrongfully imputed was not the *sole* cause of the spill. In consequence, a dumb, unmanned barge owner is forced to suffer the economic consequences for cleanup of a discharge that was caused in varying degrees by two separate entities over whom it has no meaningful control or right to control. As is painfully illustrated by this hypothetical situation, such a burden is onerous and patently unjust and could not have been intended by the drafters of the F.W.P.C.A.

The Fifth Circuit however, through its inappropriate application of *LeBeouf* (supra at p. 6), seeks to engulf the present fact situation and impose just such a burden by creating a distinct category for dumb barge liability. It should be noted that the facts presented in *Hollywood* (supra at p. 6) constitute a commonplace sequence of events in the inland waters of Texas and Louisiana, i.e., a barge in tow of the third party tug being non-negligently grounded or striking an unknown submerged object while in navigation resulting in a spill. It cannot be said with a straight face that a barge owner by more careful tug selection could have avoided such a spill any more than it could be said that by such a selection it could have avoided a spill caused solely by a non-towing vessel colliding with its barge while in navigation and in tow. As such, the Fifth Circuit's own interpretation of F.W.P.C.A. legislation intent could not be served by application of *LeBeouf* to the case at bar. Quite simply, *Hollywood* is *Tug Ocean Prince* (supra at p. 7), not *LeBeouf*. Petitioners heartily agree that the "third party defense" should meet with proper judicial constraints upon its application, but not to the ill-conceived extent demanded by *LeBeouf*.

CONCLUSION

In the face of stare decisis and clear statutory language, the Fifth Circuit in *Hollywood* (supra at p. 6) and *LeBeouf* (supra at p. 6) has totally ignored the "dominant mind" and "separate/distinct identity" concepts of tug and tow ingrained in admiralty law. Such a drastic deviation demands credible explanation and legal support. However, they are neither offered nor otherwise apparent in the Court's opinions. It is easy to envision the chaotic potential of this omission.

The stated purposes of the Fifth Circuit in narrowly construing, and in the case of dumb barges, eliminating the "third party defense" are no doubt well intentioned and perhaps philosophically appealing to some. Nevertheless, the Fifth Circuit has ignored the plain wording of § 1321(f)(1) and has compounded its first error in disregarding established maritime principles by resorting to speculation on legislative intent underlying the F.W.P.C.A.

When statutory language is clear, no resort to legislative intent is permitted. United States v. Oregon, 366 U.S. 643, 648, 81 S.Ct. 1278, 6 L.Ed.2d 575 (1961). Assigned the task only of interpreting a select portion of the F.W.P.C.A., the Fifth Circuit has instead sought to usurp the legislative function by rewriting the statute to comport with what it would like the Act to have said.

In depriving a dumb barge owner of his legislated right to the "third party defense" under § 1321(f)(1), the Fifth Circuit is seeking not only to impose liability without fault, but also without justification. Neither *Hollywood* (supra at p. 6) nor *LeBeouf* (supra at p. 6) hired a tug to act in their place, because neither was in the

business of physically transporting petroleum cargo. Both merely furnished receptacles for inland water storage of product during transportation affected by third party motive power. If it had been found in *Hollywood* (supra at p. 6) that the barge was unseaworthy and that such unseaworthiness had caused or contributed to the spill, Petitioners would not presently be before this Court. But when an unmanned barge, as here, is furnished in a seaworthy condition and taken in tow for transport by a distinct and separate entity, it ignores reality to suggest that the barge owner had or retained "ultimate control" over the tug and therefore over the discharge of oil.

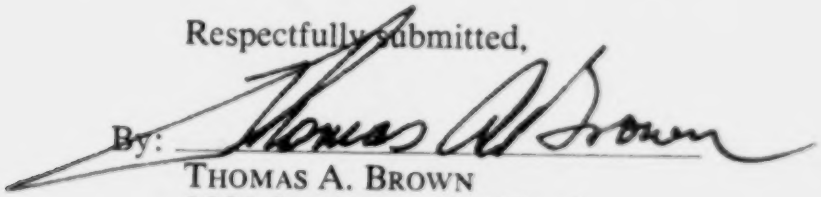
Regretably, navigational discharges are a fact of life in today's maritime industry. True also is the fact that navigational discharges are predominantly caused by negligent or non-negligent acts or omissions of the tug while performing its navigational functions with a barge in tow. Accordingly, if the goals of the F.W.P.C.A. and of traditional tort policy are to be served, then liability must be meted out to those who realistically *control* the movement and *cause* the discharge, not to those who merely own the receptacle from which the spill emanates but who are otherwise without culpability.

Tamano (supra at p. 7) and *Tug Ocean Prince* (supra at p. 7), through the sound application of maritime concepts, have discovered the key which unlocks the door to the "third party defense" and allows it to function as drafted. *LeBeouf* (supra at p. 6) however mindlessly shuts the door and discards the key. Failure to reopen this door by reversal of *Hollywood* (supra at p. 6) will not only create mass confusion and uncertainty in F.W.P.C.A. interpretation, but will also cause a disruption of the law

of tug and tow and engender needless volumes of future litigation. However, Supreme Court sanctioning of a policy of applying existing maritime jurisprudence in aid of F.W.P.C.A. interpretation will promote continuity in the rapidly developing area of case law in this area and inject substance into the Act which has in part been neutralized by *LeBeouf*.

WHEREFORE, Petitioners pray that this Petition be granted so that the controlling issues can be more fully explored.

Respectfully submitted,

By: 

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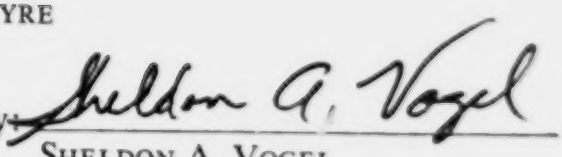
By: 

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellant,

v.

HOLLYWOOD MARINE, INC., et al.,
Defendants-Appellees.

No. 80-1647

UNITED STATES COURT OF APPEALS
Fifth Circuit
Unit A

Aug. 25, 1980.

Government sued owner of barge to recover the cost of removal of oil which had spilled from the barge into navigable waters. The United States District Court for the Southern District of Texas, George E. Cire, J., 487 F.Supp. 1211, rendered judgment for the barge owner and Government appealed. The Court of Appeals held that a tug could not be considered a "third party" in order to allow the owner of the barge to avoid liability for an oil spill which occurred while the vessel was in the tow of the tug.

Reversed and remanded.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, POLITZ, and TATE, Circuit Judges.

PER CURIAM.

The appellant, the United States, seeks summary reversal of the lower court judgment disallowing any recovery for the costs of the clean-up of an oil spill from the appellee, Hollywood Marine. The United States bases its motion on a recent opinion by this court, *United States v. LeBeouf Bros. Towing Co.,* 621 F.2d 787 (5th Cir. 1980), which reversed a district court decision relied upon by the court below in the instant case. *LeBeouf,* which is factually similar to the case under consideration, involved the interpretation of a section of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1321(f)(1). The Fifth Circuit found that, under that section, a tug will not be considered a "third party" in order to allow the owner of a discharging vessel to avoid liability for an oil spill occurring while the vessel is in the tow of the tug.

The reversal of the district court opinion in *LeBeouf,* relied upon below, makes appropriate our grant of an order for summary reversal and remand. Thus, the expense of filing the record and the briefs in a case that would necessarily be reversed by this court on a hearing on the merits is avoided.

Hollywood Marine, appellee, properly points out to this court that a rehearing will be applied for in the *LeBeouf* decision, as a consequence of which (or of Supreme Court review) the initial *LeBeouf* ruling may be changed. However, should rehearing be granted in this court in *LeBeouf,* Hollywood's position will be adequately protected by its timely application for rehearing;

for then ruling upon this application and issuance of mandate will be withheld until final action on *LeBeouf* in this court.

Accordingly, we GRANT the appellant's motion to reverse the judgment and to remand this case to the United States District Court for the Southern District of Texas for further proceedings in accordance with law.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-78-173

UNITED STATES OF AMERICA,
Plaintiff,

v.

HOLLYWOOD MARINE, INC., and
WATER QUALITY INSURANCE SYNDICATE,
in personam, and T/B-524, *in rem,*
Defendants.

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The above-entitled matter having been tried to the Court on the 9th day of April 1980; and the Court having heard the evidence and reviewed the pleadings, exhibits, deposition, and stipulations filed herein, enters the following findings and conclusions.

FINDINGS OF FACT

1. This civil action arose within the Southern District of Texas.

2. Hollywood Marine, Inc., is and was at all material times, a corporation doing business in the Southern District of Texas.

3. On August 5, 1976, and at all times material hereto, the T/B B-524 was a United States documented, steel hulled tank barge, and Hollywood Marine, Inc., was its bareboat, chartered owner.

4. Water Quality Insurance Syndicate was at all pertinent times the insurer of Hollywood Marine, Inc., as owner-operator of the B-524, for liability for oil clean up costs.

5. On August 5, 1976, and at all times material hereto, Three Jack Towing, Inc., was the owner and operator of the Tug THREE JACK, and was engaged in the business of general towage in the coastal and inland waters of Texas, including the Gulf Intracoastal Waterway.

6. On August 5, 1976, and at all times material hereto, Hollywood Marine, Inc., was engaged in the business of transporting petroleum cargo by barge in the coastal and inland waters of Texas, including the Gulf Intracoastal Waterway, through the use of tugboats exclusively owned, controlled, and operated by third parties.

7. On August 5, 1976, and at all times material hereto, the B-524 was a tank barge of 1,692 gross and net tons, having an overall length of 290 ft., breadth of 52.5 ft., hull depth of 12 ft., and double bottom hull plating.

8. On January 13, 1976, Hollywood Marine, Inc., entered into a Boat Charter Agreement with Three Jack Towing, Inc., pursuant to which Three Jack Towing, Inc., was to provide the Tug THREE JACK to perform towing services for Hollywood Marine, Inc.'s barges. Under the terms of the agreement, Three Jack Towing, Inc., warranted that the vessel to be furnished (THREE JACK) would be in all respects properly manned, equip-

ped and supplied. The agreement further provided that Three Jack Towing, Inc., would act solely as an independent contractor and would have exclusive control in every particular of the method and manner of performing towing operations. Three Jack Towing, Inc., also agreed to indemnify Hollywood Marine, Inc., against all claims of third parties for damage caused by the towage operations and further agreed to comply with all navigation laws and regulations with respect to tug and tow and indemnify Hollywood Marine, Inc., from claims arising out of the violation of any laws or regulations, either State or Federal.

9. On or about August 5, 1976, the Barge B-524, as part of the tow of the Tugboat THREE JACK, operating under the terms and provisions of the Boat Charter Agreement dated January 13, 1976, was proceeding eastbound on the Intracoastal Waterway area of Mile 255 when oil was observed spilling into the navigable waters of the United States. The B-524 discharged in excess of 2,000 gallons of oil into the waterway, creating a sheen on the waters.

10. At the time of the oil spillage, Hollywood Marine, Inc., had no control over the method or manner of navigation of the THREE JACK or the B-524, had no personnel onboard the tug or the barge during towage, and in no way directed or supervised the master or crew onboard the tug.

11. The B-524 had been in the exclusive control and in tow of the Tug THREE JACK since prior to July 1976.

12. The B-524 was seaworthy and fit for the carriage of petroleum products when it came into the exclusive control and possession of Three Jack Towing, Inc.

13. The B-524 sustained damage, causing the oil spill of August 5, 1976, while operating under the exclusive control of the Tug THREE JACK pursuant to the terms of the Boat Charter Agreement of January 13, 1976, between Three Jack Towing, Inc., and Hollywood Marine, Inc.

14. The United States Coast Guard caused the oil to be cleaned up at a total cost of $61,816.85, which amount has been paid by the United States.

CONCLUSIONS OF LAW

This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1345 and 33 U.S.C. § 1321(n). The Government's cause of action to recover the cost of removal of oil from the navigable waters of the United States is governed by the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.*, as it existed prior to the Amendments of December 27, 1977.

Under the Act, a vessel discharging oil in violation of § 1321(b)(3) and her owners are liable without fault for the Government's clean up costs. One statutory defense to such liability is "where the discharge was caused solely by an act or omission of a third party without regard to whether such an act or omission was or was not negligent." 33 U.S.C. § 1321(f)(1)(D).

In *Burgess v. M/V Tamano,* 564 F.2d 964 (1st Cir. 1976), *cert. denied,* 435 U.S. 941, 98 S.Ct. 1520 (1978), a compulsory pilot was held not to be a third party within this exception as to the owners of a supertanker because the pilot was at all times subject to the offending ship's control. In *United States of America v. LeBeouf Brothers*

Towing Co., 1978 A.M.C. 2195 (E.D. La. 1978), the owners of an unmanned and non self-propelled barge that discharged oil while operating under a towage agreement with the owners of a tug, were held to be within the third party exception. The defendant/barge owner in *LeBeouf* never controlled the routine operations of the tug and its crew, other than to dictate itinerary, and the Louisiana District Court held that the negligence of the tug's crew could not be ascribed to the Defendant merely because he owned the barge. The Court expressed the view that "the purpose of the third party defense is to relieve the owner of a vessel of liability for acts done by parties who are not controlled by the offending vessel." 1978 A.M.C. at 2199.

The Boat Charter Agreement between Three Jack Towing, Inc., and Hollywood Marine, Inc., is known as a "time charter" or a "fully found charter," under which Three Jack Towing, Inc., was given complete and exclusive control over the manner of performing the towage of Hollywood Marine's barges. Where a tug is in sole charge of the navigation and as an independent contractor has undertaken to tow another vessel, the tow is not liable for the tug's fault. *Walker v. Tug Diane,* 350 F.Supp. 1388 (D.C. Virgin Islands 1972). The owner of the tow is liable for the seaworthiness of the tow while the tug owner is responsible for its safe navigation. *Hart v. Blakemore,* 410 F.2d 218 (5th Cir. 1969).

Having found that the B-524 was delivered to the exclusive possession and control of Three Jack Towing, Inc., in a seaworthy condition, the Court concludes that Hollywood Marine, Inc., cannot be held responsible for the oil spillage which is the subject of this cause of action.

In reaching this conclusion, the court holds that the oil spill of August 5, 1976, was caused by the act of a third party and that, therefore, Hollywood Marine, Inc., is protected by the third party defense to the Federal Water Pollution Control Act. 33 U.S.C. § 1321(f)(1)(D). The circumstances surrounding the oil spill and the relation of the parties in the instant case are identical to those found in *United States of America v. LeBeouf Brothers Towing Co.,* 1978 A.M.C. 2195 (E.D. La. 1978). Hollywood Marine, Inc., having turned over its unmanned and non self-propelled barge to the Tug THREE JACK for towing and operation, is not responsible for clean up costs incurred as a result of the actions of third parties, over whom Hollywood Marine, Inc., had no control.

Accordingly, the United States is not entitled to recovery of its clean up costs from the Defendants and a take nothing judgment shall be entered herewith.

SIGNED and ENTERED on this 15th day of April 1980.

/s/ GEORGE E. CIRE
George E. Cire
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-78-173

UNITED STATES OF AMERICA,
Plaintiff

v.

HOLLYWOOD MARINE, INC., and
WATER QUALITY INSURANCE SYNDICATE,
in personam, and T/B-524, *in rem,*
Defendants

FINAL JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law entered herewith, it is

ORDERED, ADJUDGED and DECREED that Plaintiff, United States of America, have and take nothing by this action against the Defendants. Costs are taxed against the Plaintiff.

THIS IS A FINAL JUDGMENT.

SIGNED and ENTERED this 15th day of April, 1980

/s/ GEORGE E. CIRE
George E. Cire
United States District Judge

UNITED STATES of America,
Plaintiff-Appellant,

v.

LeBEOUF BROTHERS TOWING CO., etc.,
Defendant-Appellee.

No. 78-3261

UNITED STATES COURT OF APPEALS
Fifth Circuit

July 18, 1980.

Appeal was taken from an order of the United States District Court for the Eastern District of Louisiana, Edward J. Boyle, Sr., J., which entered judgment against the Government in its suit to recover cleanup costs for an oil spill from a tanker barge. The Court of Appeals, Thornberry, Circuit Judge, held that tugboat, over which owner-operator of tanker had no direct control or supervision, was not "third party" within meaning of section of Federal Water Pollution Control Act under which discharging vessel is not liable for costs of cleanup of oil spill caused by act or omission of third party.

Reversed and remanded.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before THORNBERRY, ANDERSON and THOMAS A. CLARK, Circuit Judges.

THORNBERRY, Circuit Judge:

In this appeal from judgment against the Government in its suit to recover clean-up costs under 33 U.S.C. § 1321 (1976) for an oil spill from appellee's tanker barge, we must interpret the clause in section 1321(f)(1) that establishes a third-party defense for the owners of the discharging vessel. Because we conclude that the tugboat hired by the appellees in this case does not constitute a "third party" under section 1321(f)(1), we reverse the judgment and remand the case to the court below.

I. Facts.

The parties stipulated the facts as follows. LeBeouf is in the business of transporting petroleum products in tanker barges. In 1974 LeBeouf contracted with Bayou Marine Corporation to obtain a tug and crew that would tow the non-selfpropelled tanker barge LBT # 4 on an itinerary specified by LeBeouf. Bayou secured the M/V Harding R, a tug owned by Barracuda Marine Corporation. The tug crew loaded and unloaded LeBeouf's cargo at the places and times designated in LeBeouf's itinerary. LeBeouf engaged in no other supervision over the crew. In March 1974 the tug crew unloaded oil from the LBT # 4 at Westwego, Louisiana. A tug crewman who was working as a tankerman without a license, in violation of 33 C.F.R. § 155.710(a)(2) (1979), accidentally opened the wrong valve and discharged sixty barrels of crude oil onto the Mississippi River.

Neither LeBeouf, Bayou, nor Barracuda cleaned up the oil spill. Finally the Coast Guard contracted to clean up the spill at a total cost of $38,689. The Government

sued to recover this clean-up cost under the Federal Water Pollution Control Act, 33 U.S.C. § 1321, in March 1977. The district court dismissed the Government's suit against LeBeouf because it concluded that the oil spill was caused by a "third party" under section 1321(f)(1).

II. Third-Party Defense under Section 1321(f)(1).

Under section 1321(f)(1) the owner or operator of the discharging vessel is liable to the Government for the costs of cleaning up an oil spill

> [e]xcept where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses . . .

In cases involving inland oil spills, section 1321(g) requires the Government to sue the owner or operator of the discharging vessel for clean-up costs before it can sue a "third party" who may have caused the spill. The statute does not define what constitutes such a "third party."

LeBeouf contends that the term "third party" in section 1321(f)(1) should be interpreted broadly to include all parties—such as the tugboat in this case—over whom the owner-operator has no direct control or supervision. As authority for this interpretation, LeBeouf relies upon the district court opinion in *Tug Ocean Prince, Inc. v. United States,* 436 F.Supp. 907, 923-24 (S.D.N.Y. 1977), *aff'd in part and rev'd in part on other*

grounds, 584 F.2d 1151 (2d Cir. 1978), *cert. denied,* 440 U.S. 959, 99 S.Ct. 1499 (1980). In *Tug Ocean Prince* a tug towed a tanker barge into submerged rocks, which caused the barge to spill oil onto the Hudson River. The tug owner sued to limit its liability as a "third party" under section 1321(g) so that damages would be calculated with reference to the weight of the tug alone, not with reference to the combined weight of the tug and barge together. The district court did not discuss section 1321(f)(1), but it treated the tug as a "third party" for purposes of section 1321(g), and construed that statute so that the tug's liability would be limited to damages calculated only with reference to the weight of the tug alone.

A broad interpretation of the term "third party" was rejected by the First Circuit in *Burgess v. M/V Tamano,* 564 F.2d 964, 981-82 (1st Cir. 1977), *cert. denied,* 435 U.S. 941, 98 S.Ct. 1520, 55 L.Ed.2d 537 (1978), in which the court expressly discussed what constitutes a "third party" under seciton 1321(f)(1). In *Burgess* the court held that a supertanker's temporary local pilot did not constitute a "third party" under section 1321 (f)(1). As a result, the owners of the supertanker were held liable for an oil spill that occurred because the local pilot negligently ran the supertanker into a submerged ledge in a Maine harbor. The court concluded that the legislative purpose in drafting section 1321 as a strict liability statute would be undermined unless the third-party defense was narrowly interpreted. Even though the local pilot might be regarded as an independent contractor, he could not constitute a "third party" because the pilot acted for the ship and was subject to its ultimate control. In dicta the court reasoned that a shipyard that

installed a defective valve would likewise not constitute a "third party" for the purpose of protecting the shipowner from liability for an oil spill caused by the defect in the valve. If a vandal opened the valve and caused the spill, however, the court said that the third-party defense would apply.

Following the reasoning of the First Circuit in *Burgess,* we conclude that the third-party defense in section 1321 (f)(1) must be narrowly interpreted. The statute's comprehensive scheme for preventing and cleaning up oil spills would be undermined if barge owners like LeBeouf could escape strict liability merely by hiring out their operations to tugs and independent contractors. A narrow interpretation of the third-party defense would make it consistent with the other section 1321(f)(1) defenses, which include only narrow exceptions such as acts of God, acts of war, and instances in which the Government's own negligence is the sole cause of the spill. The only significant legislative history relating to the third-party defense also suggests that a narrow interpretation is proper; a committee report indicates that the drafters' primary purpose for including the third-party defense was to cover situations in which a third-party ship collided with an unrelated, oil-carrying vessel and caused a spill. S. Rep. No. 91-351, 91st Cong., 1st Sess. 6 (1969).

Under the analysis used in *Burgess,* the tug in this case does not constitute a "third party" that would protect LeBeouf from liability for clean-up costs under section 1321. LeBeouf hired the tug to act in its place. Although the tug operated as an independent contractor, LeBeouf held ultimate control over it by hiring it in the first

place, specifying its itinerary, and retaining it throughout the job. Our narrow interpretation of the third-party defense promotes the goals of the statute and of traditional tort policy because it will encourage barge owners like LeBeouf to select tugs carefully and to insure against potential losses. LeBeouf can also require a tug to indemnify it for losses caused by the tug's conduct alone.

Because the tug does not constitute a "third party" for the purpose of protecting LeBeouf from liability under section 1321, we reverse the judgment and remand the case to the court below.

REVERSED AND REMANDED.

APPENDIX C

UNITED STATES of America,
Plaintiff-Appellant,

v.

HOLLYWOOD MARINE, INC., et al.,
Defendants-Appellees.

No. 80-1647

UNITED STATES COURT OF APPEALS
Fifth Circuit
Unit A

Aug. 25, 1980.

Government sued owner of barge to recover the cost of removal of oil which had spilled from the barge into navigable waters. The United States District Court for the Southern District of Texas, George E. Cire, J., 487 F.Supp. 1211, rendered judgment for the barge owner and Government appealed. The Court of Civil Appeals held that a tug could not be considered a "third party" in order to allow the owner of the barge to avoid liability for an oil spill which occurred while the vessel was in the tow of the tug.

Reversed and remanded.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, POLITZ, and TATE, Circuit Judges.

PER CURIAM.

The appellant, the United States, seeks summary reversal of the lower court judgment disallowing any recovery for the costs of the clean-up of an oil spill from the appellee, Hollywood Marine. The United States bases its motion on a recent opinion by this court. *United States v. LeBeouf Bros. Towing Co.*, 621 F.2d 787 (5th Cir. 1980), which reversed a district court decision relied upon by the court below in the instant case. *LeBeouf*, which is factually similar to the case under consideration, involved the interpretation of a section of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1321(f)(1). The Fifth Circuit found that, under that section, a tug will not be considered a "third party" in order to allow the owner of a discharging vessel to avoid liability for an oil spill occurring while the vessel is in the tow of the tug.

The reversal of the district court opinion in *LeBeouf*, relied upon below, makes appropriate our grant of an order for summary reversal and remand. Thus, the expense of filing the record and the briefs in a case that would necessarily be reversed by this court on a hearing on the merits is avoided.

Hollywood Marine, appellee, properly points out to this court that a rehearing will be applied for in the *LeBeouf* decision, as a consequence of which (or of Supreme Court review) the initial *LeBeouf* ruling may be changed. However, should rehearing be granted in this court in *LeBeouf*, Hollywood's position will be adequately protected by its timely application for rehearing;

for then ruling upon this application and issuance of mandate will be withheld until final action on *LeBeouf* in this court.

Accordingly, we GRANT the appellant's motion to reverse the judgment and to remand this case to the United States District Court for the Southern District of Texas for further proceedings in accordance with law.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 80-1647

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

HOLLYWOOD MARINE, INC., ET AL,
Defendants-Appellees.

Appeal from the United States District District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

(October 15, 1980)

Before BROWN, POLITZ, and TATE, Circuit Judges.

PER CURIAM:

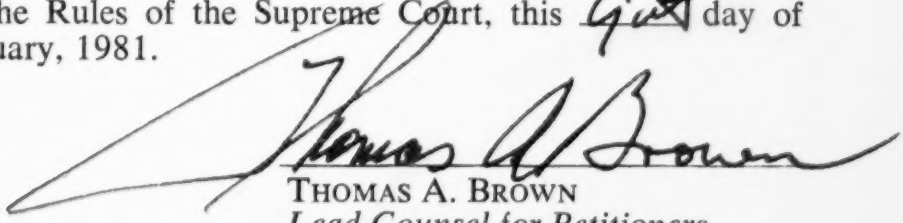
IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ ALBERT TATE
United States Circuit Judge

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari filed on behalf of Petitioners, Hollywood Marine, Inc. and Water Quality Insurance Syndicate, were duly served upon Respondent, United States of America, by placing same in the United States mail, first-class postage prepaid and addressed to the Solicitor General, Department of Justice, Washington, D. C. 20530 in accordance with Rule 28.3 and 28.4 of the Rules of the Supreme Court, this 6th day of January, 1981.



THOMAS A. BROWN
Lead Counsel for Petitioners

Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,

No. 80-1160

In the Supreme Court of the United States

OCTOBER TERM, 1980

HOLLYWOOD MARINE, INC., AND WATER QUALITY INSURANCE SYNDICATE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the owner of a barge from which oil is spilled may avoid liability to the United States for clean-up costs by asserting that the tugboat operator that caused the spill is a "third party" under 33 U.S.C. 1321(f)(1).

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United States v. *LeBeouf Brothers Towing Co.*, 1978 A.M.C. 2195, rev'd, 621 F. 2d 787, rehearing denied, 629 F. 2d 1350 ... 3, 4, 5, 6

Statute:

Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.* :

Section 311(f)(1), 33 U.S.C. 1321(f)(1) 2, 3, 4, 5, 6, 7

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In the Supreme Court of the United States

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HOLLYWOOD MARINE, INC., AND WATER QUALITY INSURANCE SYNDICATE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is reported at 625 F. 2d 524. The opinion of the district court (Pet. App. B1-B6) is reported at 487 F. Supp. 1211.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1980 (Pet. App. A1). A petition for rehearing was denied on October 15, 1980 (Pet. App. C4). The petition for a writ of certiorari was filed on January 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This action was brought by the United States under the Federal Water Pollution Control Act for recovery of $61,816.85 in clean-up costs incurred by the United States

Coast Guard as a result of an oil spill from a barge owned by petitioner Hollywood Marine, Inc. (Pet. App. B2-B4). Hollywood Marine is engaged in the business of transporting petroleum cargo by barge in the coastal and inland waters of Texas (*id.* at B2). Its barges are towed by independent tugboat operators with whom Hollywood contracts for towage services (*id.* at B2-B3).

In this case, Hollywood contracted with Three Jack Towing, Inc., for the latter to provide the tugboat THREE JACK to tow Hollywood's barge T/B B-524 (Pet. App. B2). Under the contract, Hollywood apparently specified the points or route where the barge was to be loaded and discharged, and it delegated to Three Jack control over the method and manner of performing towing operations, including navigational matters (*id.* at B3).

On August 5, 1976, Hollywood's barge T/B B-524 discharged over 2,000 gallons of oil into the Intracoastal Waterway in Texas (Pet. App. B3). The spill occurred as a result of damage sustained by the barge while it was under Three Jack's control (*id.* at B4).

The Coast Guard took steps to have the spilled oil cleaned up, at a total cost to the United States of $61,816.85 (Pet. App. B4). Pursuant to Section 311(f)(1), (n) of the Federal Water Pollution Control Act, 33 U.S.C. 1321(f)(1), (n), the government subsequently filed suit in the United States District Court for the Southern District of Texas, seeking recovery of this sum from Hollywood as owner of the discharging vessel. Hollywood's defense was that the oil spill was caused by an act or omission of its independent contractor, Three Jack, and that Three Jack was a "third party" under Section 311 of the Federal Water Pollution Control Act, which excepts from liability for clean-up costs the owner of a discharging vessel where the discharge is caused solely by "(A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or

(D) an act or omission of a third party * * *." 33 U.S.C. 1321(f)(1).

The district court sustained this defense, finding that Hollywood was "protected by the third party defense to the Federal Water Pollution Control Act" (Pet. App. B6). The court considered the facts of the case to be "identical" (*ibid.*) to those found in *United States* v. *LeBeouf Brothers Towing Co.*, 1978 A.M.C. 2195 (E.D. La.) (not otherwise reported).

Shortly thereafter, the Fifth Circuit reversed the district court's decision in *LeBeouf* (Pet. App. B8-B13), holding that "the third-party defense in section 1321(f)(1) must be narrowly interpreted. The statute's comprehensive scheme for preventing and cleaning up oil spills would be undermined if barge owners * * * could escape strict liability merely by hiring out their operations to tugs and independent contractors" (*id.* at B12). See *United States* v. *LeBeouf Brothers Towing Co.*, 621 F. 2d 787, rehearing denied, 629 F. 2d 1350 (5th Cir. 1980).

On the basis of its decision narrowly construing the third-party defense in *LeBeouf*, the court of appeals summarily reversed the judgment of the district court in the present case (Pet. App. A1-A3). The court explained that, as in *LeBeouf*, "a tug will not be considered a 'third party' in order to allow the owner of a discharging vessel to avoid liability for an oil spill occurring while the vessel is in the tow of the tug" (*id.* at A2). Finding *LeBeouf* and the instant case to be "factually similar" (*ibid.*), the court of appeals accordingly reversed the district court's decision and remanded the case for further proceedings on the government's action for recovery of clean-up costs from Hollywood (*id.* at A3).

ARGUMENT

1. a. The court of appeals' construction of the third-party defense in the Federal Water Pollution Control Act is cor-

rect. Under the Act, the responsibility for clean-up of oil discharged from vessels into navigable waters is governed by a statutory scheme that imposes strict liability on the discharging vessel's "owner or operator" subject only to certain narrow defenses enumerated in the Act. Congress created no defense for the vessel owner based on the assertion that the discharge from its vessel was caused by an independent contractor, and the owner cannot avoid its statutory duties by asserting that the spill was caused by other persons to whom responsibility for the operation of the vessel had been delegated.[1] Thus, the court of appeals correctly concluded that the tug in this case is not a "third party" within the meaning of the defense provided by 33 U.S.C. 1321(f)(1)(D).

b. Notwithstanding petitioner's assertion, the Fifth Circuit's construction of the third-party defense in this case and in *LeBeouf* is fully consistent with the decision of the First Circuit in *Burgess* v. *M/V TAMANO*, 564 F. 2d 964 (1977), cert. denied, 435 U.S. 941 (1978).

In TAMANO, the First Circuit held that a pilot was not a "third party" so as to relieve the shipowner of responsibility for an oil spill resulting from a pilot-caused grounding. While the court observed that a pilot "is at all times subject to the ultimate control of the ship's master" (564 F. 2d at 982), that statement clearly was not the basis of the court's decision.[2] Rather, the court proceeded on the basis that a

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[1]We see no basis for distinguishing vessel contractors who are charged with navigation or towage of a vessel from other types of contractors (*e.g.*, repair yards, or oil loading and discharge operators), as urged in point II of the petition. All act for the vessel and therefore are not "third parties" under 33 U.S.C. 1321(f)(1). Moreover, contrary to petitioners' contention, both courts below correctly recognized (Pet. App. A2, B6) that this case and *LeBeouf* are substantially identical.

[2]The statement was directed to the shipowner's argument that the pilot was a "compulsory" pilot, and that taking a compulsory pilot should not be deemed to be an act within the responsibility of the shipowner (564 F. 2d at 982).

pilot *was* an "independent contractor." However, recognizing that unless the statutory defenses "are narrowly construed * * * the legislative purpose would be largely vitiated," the court reasoned that, because the first three of the defenses (act of God, act of war, and governmental negligence) "are manifestly addressed to actions entirely outside the ship, or in the case of actors, to strangers," the "third party" defense should be similarly construed to apply only to complete outsiders (564 F. 2d at 982). The First Circuit illustrated its holding by noting that "if [a ship's] valve failed because of an act of the installer, the owners should *not* be permitted to avoid liability by claiming that the installer was a third party because he was an independent contractor * * *. The installer acts for the ship" (*ibid.*; emphasis added). The court explained that while the vessel owner or operator "may have been forced by practical necessities to hire the particular shipyard that installed the defective valve * * * they must take the ports they select as they find them" (*ibid.*).

The analysis in *TAMANO* and its rejection of a "broad construction" of the third-party defense were expressly adopted and approved by the Fifth Circuit's holding in *LeBeouf* and in the present case that a tug operator under contract is not a "third party" with respect to the owner of the discharging barge. Both courts are in agreement that Congress did not intend to immunize a barge owner where the spill is caused by its contractor (the pilot in *TAMANO*, the tug operator here and in *LeBeouf*). Both courts agree that "third party," as used in 33 U.S.C. 1321(f)(1), means a complete outsider (*e.g.*, a colliding vessel or a vandal). See 564 F. 2d at 982; Pet. App. B11-B13. Accordingly, there is no merit to petitioners' contention that the construction of the third-party defense enunciated by the court of appeals here is in conflict with the decision of the First Circuit in *TAMANO*.

The other case cited by petitioners in support of their assertion of a conflict among the circuits is *Tug Ocean Prince, Inc.* v. *United States*, 436 F. Supp. 907 (S.D.N.Y. 1977), aff'd in part and rev'd in part, 584 F. 2d 1151 (2d Cir. 1978), cert. denied, 440 U.S. 959 (1979). In that case, oil was spilled from a barge as a result of a grounding caused by the negligence of the barge's tug. The government claimed clean-up costs from both the barge owner and the tug operator. The district court dismissed the government's claim against the owner on the ground that it was "not * * * responsible for the oil spill * * *" (436 F. Supp. at 926). The court provided no analysis of the third-party defense under 33 U.S.C. 1321(f)(1), although it did hold that the tug operator was subject to limited liability as a third party under 33 U.S.C. 1321(g) (436 F. Supp. at 926). The United States appealed only the limitation ruling and was successful in that appeal. See 584 F. 2d at 1161-1164. The Second Circuit had no occasion to address the question of the correctness of the district court's dismissal of the government's claim against the barge owner for clean-up costs, since that issue was not raised on appeal.

While there appears to be an inconsistency between the decision of the court of appeals here and the decision of the district court in *Ocean Prince* regarding the liability of a barge owner for clean-up costs, review by this Court is not required at present. To our knowledge, the district court's decision in *Ocean Prince* is the only judicial decision holding a barge owner immune from liability for clean-up of an oil spill caused by its tug operator. The district court's decision on the point in *Ocean Prince* is unexplained, and we believe that it is unlikely to be followed by other courts, especially in view of the recent decisions of the First Circuit in *TAMANO* and the Fifth Circuit in *LeBeouf* and here. If

it should be followed by a court of appeals in another case, there would be time enough at that point for the Court to resolve such a conflict.[3]

2. Petitioners also argue (Pet. 11; emphasis in original) that the Fifth Circuit's construction of the third-party defense in the Federal Water Pollution Control Act "overrule[s] long-standing admiralty precedent * * * holding that a dumb barge is *not* liable for the tug's fault merely because the two vessels are attached." Petitioners cite several cases involving collisions between a tug and tow and another vessel in which it was held that the towed vessel or barge is not responsible for the acts or omissions of the tug. See, *e.g.*, *Sturgis* v. *Boyer*, 65 U.S. (24 How.) 110, 122-125 (1860). Petitioners contend that the Fifth Circuit's decision in this case erodes or eliminates this doctrine, "thereby rendering every owner of a dumb barge, however innocent, vulnerable to third party liability *in all maritime litigation*" (Pet. 13; emphasis added).

This contention is an obvious overstatement and is legally unfounded. It is only in cases of discharges of oil from barges that the Federal Water Pollution Control Act imposes strict liability upon the barge owner. Nothing in the Fifth Circuit's construction of the Act has any effect on the

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[3]Petitioners' reliance (Pet. 9) on the statement of the district court in *Ocean Prince* that Congress "inject[ed] traditional admiralty concepts" into the limitation provision of 33 U.S.C. 1321(g) (see 436 F. Supp. at 923) does not support their position regarding the scope of the "third-party" defense in 33 U.S.C. 1321(f)(1). First, the district court's ruling on the limitation of liability in *Ocean Prince*, to which the statement was addressed, was reversed by the court of appeals. Second, while the concept of limitation does have historic antecedents in maritime jurisprudence, the concept of a "third party" in Section 311(f)(1) of the Federal Water Pollution Control Act is a statutory term of art concerned with present-day policies regarding responsibility for water pollution, and is not tied to traditional maritime jurisprudence regarding the law of collision. See pages 7-8, *infra*.

general maritime law that immunizes barge owners from liability for the maritime torts of their tug operators.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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MARCH 1981

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[4]The general maritime law on this point is judge-made and does not turn on statutory terms such as "third party."